

UNITED STATES

V.

**DEFENSE RESPONSE TO
PROSECUTION MOTION
FOR RECONSIDERATION OF
THE COURT'S FINDINGS IN
APPELLATE EXHIBIT LXVIII**

DATED: 17 November 2012

1. The Defense requests the Court to deny the Government's request for reconsideration as being untimely.

2. The Defense does not request any witnesses or evidence for this motion.

3. The Defense opposes the Government’s request for reconsideration of the Court’s 25 April 2012 finding that “the Government properly understood its obligation to search for exculpatory *Brady* material, however, the Government disputed that it was obligated to disclose classified *Brady* information that was material to punishment only.” AE LXVIII, at Paragraph 6.

4. The Government's request is untimely. The Court ruled on this issue *206 days ago*. If the Government believed that the Court's ruling was in error, the Government had ample opportunity in the ensuing months to request reconsideration. The Government's silence in the 206 days following the Court's ruling speaks volumes; it speaks to the Government's acknowledgement that the Government did not take issue with the Court's factual finding. The time to speak was long ago. The Court should not now permit the Government to rehash an argument that was decided in the Defense's favor seven months ago.

5. The Court's factual finding was not an insignificant finding or a throwaway line in a ruling. Rather, it *was the issue* the Court was asked to rule on so many months ago. The Defense has since referenced this ruling on multiple occasions and in multiple different contexts. The

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Government cannot ignore the Court's ruling until it feels like contesting it on the eve of a dispositive motion.¹ The Government's request for reconsideration of this ruling is being made in bad faith if the Government genuinely believed the court to have erred, it would have spoken many moons ago. The Government provides absolutely no explanation for why it is only *now* raising the issue.

6. R.C.M. 905(f) must be interpreted to require timely and good faith requests for reconsideration. Otherwise, the trial of an action could be delayed for months or years with last minute requests for reconsideration. The court in *United States v. Santiago*, 56 M.J. 610 (N.M. Ct. Crim. App. 2001) recognized that there are implicit time limits within which a party may request reconsideration of a judge's ruling. In that case, the court stated that "the Manual allows a party to request reconsideration for a military judge's ruling, but does not address the timeliness of such a request." *Id.* at 615. The court considered it "appropriate to apply the time limits ... to reconsideration requests..." *Id.* The court then found that the Government's motions for reconsideration were untimely because the trial counsel filed them 53 days and 51 days after the military judge's ruling.

7. As a practical matter, the Defense is not even sure when the Government purports to re-litigate this issue. The speedy trial motion is currently scheduled for 10-14 December 2012. Assuming that the Court rules that it will reconsider the ruling, the Defense would be permitted (per the current scheduling process) two weeks to prepare its Response. The Government may wish, in turn, to file a Reply, which would take another week. The Court would then need time to read the filings. Then, the parties would have to litigate the issue. The Defense is not clear on when the Government would have all of this to take place.

8. If the Court is inclined to grant the Government's motion for reconsideration, the Defense requests until 6 December 2012 to file its Response. The Defense acknowledges that this is more than the usual 2-week suspense date. However, based on the Government filing date of 16 November 2012, two weeks would fall on 30 November 2012, right in the middle of the upcoming Article 39(a) session.

CONCLUSION

9. The Defense requests the Court to deny the Government's request for reconsideration as being untimely.

Respectfully submitted,



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¹ The Court should also note that the Government engaged in the same tactics with respect to its motion for reconsideration of the Department of State damage assessment ruling. There, the Government waited two months before requesting reconsideration of the Court's ruling.